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## ARGUED AND DETERMINED
IN THE
## SUPREME COURT
OF THE
## STATE OF LOUISIANA.

West. District. *October* 1814.

WESTERN DISTRICT. OCTOBER TERM, 1814.

MORGAN'S AD'R. *vs.* WOORHIES.

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lands; which were disposed of, at the third and last exposure, on a year's credit. The appellant refused to accept the bond taken by the appellee, for the payment of this property; and brought suit against him for the amount expressed in the writ, which had been delivered him for the execution. The persons against whom the writ issued, were admitted to own, within the Parish of St. Landry, personal property and slaves, sufficient by seizure to have satisfied the plaintiff's writ.

THE District Court decided in favour of the appellee generally.

*Baldwin* and *Porter*, for the plaintiff. The question to be decided, in this cause, is of vast importance to this section of the state. The decision to be given will determine, whether or not the collection of debts will not be abandoned here: for it is evident if the defendant is allowed choice of property, he can always furnish that description, which will only sell at a year's credit. At this sale, he buys it in himself, or employs some person to do it for him; and gives bond and security to pay the money in a year. This period expired, suit has to be brought on his obligation; which takes exactly the same course of the other, and terminates by a new bond being given. This circle, in which the plaintiff pursues his debtor, has no end; and at the expiration of four or five years, all he

West. District. October 1814.

Moncada's Ad'r. vs. Woorhies.

has acquired by the pursuit, is the paying of costs; which the officers *of justice* take special care to exact from him as he goes along.

This consequence of our legislative provisions, under the practice heretofore existing, is not exaggerated; and, in the operation of our execution law, bad faith is protected, nay rewarded: confidence destroyed, and the example daily presented, of one man rioting in the enjoyment of another's property, without there existing any means of compelling him to pay for it.

If this Court can afford any remedy for these evils, it will do it. Allowing the choice of property to be seized, will be some alleviation.

Two questions present themselves.

1. Has the appellee (the defendant below) rendered himself liable to an action?

2. If he has, what is the extent of that liability?

I. The Sheriff in this case seems to have regarded the writ of execution, as altogether intended by law for the defendant's benefit; and made to enable him to elude the judgment of the court. The legal idea however attached to it is, that it is given to compel the person against whom it issues to comply with the judgment rendered against him. 2 *Bac. Abr. (American Edition)* 685. Lord Coke says, *Executio est fructus, finis et effectus legis. Co. Litt.* 289.

The law proceeding on the idea, that the execution afforded the plaintiff is for his benefit, as well as to compel the defendant to do that, which by its judgment it says he ought to have done, gives to the former his choice of writs. 2 *Bac. Abr. (A. e.)* 718, 2 *Binney* 218, 3 *Jurisprudence (Encyclopédie Française)* 418-479, 7 *ibid.* 484, 463. If it enables him then, to select that species of writ, which he conceives best calculated to force the defendant to do him justice; it is fair to presume, that in the same spirit, it also allows him *(where a necessity exists to accomplish this purpose)* the choice of property; otherwise its provisions would be inconsistent, and its means inadequate to the end it has in view.

It is true, we can cite no positive authority to this, but the reasoning on which the conclusion is drawn, seems equal in force to that of any express declaration on the subject. In our way of considering it, the law is made consistent throughout, and harmonious in its different provisions. Adopting the other construction, it is jarring and irregular; it gives the plaintiff every latitude in his means, until his object is nearly accomplished, and then defeats him; by allowing the defendant a selection, which is totally at war with the idea, on which the privilege of choice is in the first instance extended to the other.

We admit there are some Spanish authorities

West. District. October 1814.

Morgan's Adm'r. vs. Woodlief

which say, the defendant shall have the choice; but the reason is obvious. There, the property must be sold for cash; and the officer goes on till he makes it. The plaintiff being allowed the selection in that country, would be useless, nay oppressive; as it must be a matter of indifference to him, what property is seized, when his money at all events must be immediately made: but here under our execution law, requiring property to be sold at a year's credit unless it brings two thirds of its appraised value, the first and second exposure, a quite different state of things presents itself. Giving the defendant the right of choosing the property to be sold, enables him to evade the judgment of the court, and to be the oppressor instead of the plaintiff.

*Cessante causâ cessat effectus*, is a maxim of universal law always received: here the cause not only ceases, but acts the other way. When the property must be sold for cash, to admit the plaintiff to select, would be permitting him to oppress. To allow the defendant to choose, under our laws, makes him the oppressor; and produces the very consequence, which induced the Spanish law to refuse it to the former.

THERE are many provisions of the Spanish law, relating to executions, repealed by the nature of our government, and the silent operation of our statutes, without any express declaration to that effect, such as the exemption from arrest of

various officers: among others, counsellors at law; and freedom from seizure of various articles. So here, we contend that the law, according the choice to the debtor, is repealed by an act of the Legislature, directing property to be sold at twelve months credit; because allowing him the selection, enables him almost in every case to elude the judgment of the court, and defeat the object at the execution entirely.

But should the court decide against us, as to the choice of the real property, it is clear at least, that the officer has rendered himself responsible, by not seizing the personal effects of the defendants. Our statutory provisions are so plain in regard to this, that a recourse to reasoning on the subject is unnecessary.

In the act of the Legislative Council, it is provided (*page* 236, *sect.* 14,) that if the money for which the execution issues, is not paid in three days, the Sheriff shall cause the same to be made out of the personal estate, except slaves, if sufficient personal estate exclusive of slaves can be found therein. But if sufficient personal estate cannot be found, that then he cause the same to be made of the real estate and slaves.

By this the Sheriff is positively directed to seize personal estate first, and only in default thereof to sell real estate or slaves. The words of the writ must be strictly pursued, 6 *Bac. Abr.* (*A. e.*) 168. Having disregarded both the law

West. District, October 1814.

Morgan's Ad'm. vs. Woodruff.

and his instructions, he has rendered himself liable to an action: and this leads to the second point; namely, to what extent is he responsible?

II. This will easily be ascertained, by considering, in what character the Sheriff acts when executing the process of the court, at the suit of an individual. Although a public officer, he is clearly the *agent* of the person who takes out the writ. The latter can in some instances increase, and in many diminish, the responsibility of the former, may stop him from acting, if he thinks it his interest so to do, may appoint a bailiff himself, and take all the consequences of his acts. 6 *Bac. Abr. (Ac. e.)* 157, *4 Term Rep.* 119. He may delay by his commands the execution of the writ, may consent to bail which the officer refuses. Unless the Sheriff was considered the agent of the plaintiff, the law would not permit this controul to be exercised over him: nor would it give the former, as it does, a right of action against the latter for services rendered. 1 *Comyns on contracts* 6. 1 *Esp. Nisi prius G. E.* 26, *Salkeld* 332, 5 *Term. Rep.* 470, 1 *Caines* 192.

In this instance, the agent has acted in direct opposition to the orders of the principal. The bond was taken without our consent, or as it is proved, against our express direction. We have a right then to disavow the act, and pursue him who acted illegally, and in defiance to our orders.

West. District, Oct. Ter. 1814.

Morgan & Ashe vs. Woodruff.

By his act, he has taken the place of the defendants, and we are entitled to obtain from him every thing we could have had of them.

WITHOUT citing a variety of authorities to this point, it is sufficient to refer to the great case of *Le Guen vs. Gouverneur and Kemble*, 1 *Johnson's cases* 436 *to* 524. The doctrine was elaborately examined there, and the right of the principal to pursue the agent, instead of those to whom the sale was made, is fully recognised; and the true measure of the damages adjudged to be, the amount for which the property was sold.

AGAIN, regarding him merely as a public officer, the law gives an action against him for illegal conduct: and the extent of his liability is distinguished, by the situation of the suit in which he acts improperly. If the plaintiff's demand is not ascertained by a judgment, the only remedy against the officer is *an action on the case* in which he recovers the damage he proves he has sustained. *Espinasse's Rep.* 475, 1 *Day*, 128, 1 *Str.* 650, 1 *Johnson* 215.

BUT, if judgment is already given, and the plaintiff's demand against the defendant liquidated, the moment the officer act illegally he takes that judgment on himself; an *action of debt* can be brought, and he is responsible for the whole amount originally recovered from the defendant. 2 *Institutes* 382, 2 *Black. Rep.* 1048, 2 *Strange* 153. 2 *H. Black.* 108, 2 *Term Rep.* 126.

West. District. October 1819.

Morgan's A'd. et. Woodruff.

This case is one where final judgment has been rendered; it comes then within the principle of the last mentioned authorities, and will doubtless receive a similar judgment.

*Sutton*, for the defendant. The plaintiff's counsel has in vain invoked British and French authorities, in order to ascertain the rights of a creditor, who has obtained a *fieri facias*, as well as the duties of the officer, who is to put the writ into execution.

These rights and these duties will be better defined by a true interpretation and construction of the statutes of our own country, under which the writ issues. Let us therefore inquire whether these statutes justify the pretentions of the plaintiff to the right of selecting that particular property, on which the *fieri facias* is to be executed. Why should it be given to him? *Cui bono?* All he has a right to is that the money be made. If the law has seen fit to direct certain proceedings, with regard to the sale of a certain species of property, and these proceedings are a little less speedy, in one case than in the other, he must submit in this as in all other cases to the will of the legislator. This will in no case vests any election or choice in the plaintiff. No good reason can be shewn why he should have any.

The case is quite different, with regard to the debtor. He cannot well spare his bed, his tools,

his kitchen furniture, nor that portion of his household furniture, without which his family can have but a comfortless existence. The cow, that supplies necessary food, cannot be well spared nor certain provisions which cannot be laid in advantageously in every season of that year. It would be cruel, if the debtor has any other kind of property to offer for sale, to compel him to bring such under the hammer. Humanity, therefore, claims that, if there be a choice, it should belong to the debtor. The Spanish law has several provisions for this purpose. *Curia Philipica, Juicio Executivo, verbo Execution.*

Auxiliary to it, is the act of the Legislative Council. As land is sold with more difficulty and a greater sacrifice than personal property, and as land is here useless without slaves, it provides *in tenderness to the debtor*, that the Sheriff shall first take personal property. Can it be said that the caution it uses is to be tortured into a denial to the debtor of the right hitherto secured to him of naming the particular property he can best spare.

The farmers in this state have seldom any other personal property, than the necessary household furniture, plantation tools and such animals as the labours of husbandry require. They have often a considerable property in land, often more that they can cultivate. This surplus is often the property the deprivation of which

West District. October 1814.

MORGAN'S Ad'x. vs. WOORHIES.

will occasion the less distress. The Spanish law, the basis of our jurisprudence, secures in such a case the choice of evils and we contend this boon is not taken away by the act of the Legislative Council.

WHEN the Sheriff comes to a debtor with an execution, the Spanish law cited makes it his duty to require that property may be designated to him for sale. If the debtor complies, the Sheriff neither takes or seizes any thing, but takes surety for the forthcoming of it on the day of sale, and its producing the money, *fianza de saneamiento.* If the debtor be obstinate, then and not till then, is the Sheriff to seize or take the property, and the sole object, of the part of the act of the Legislative Council cited by the plaintiff, is to point out the steps the Sheriff is to take. First he must seize personal property, next slaves and finally land.

IN the case before the Court, the debtors, under the Spanish law quoted, obeyed the Sheriff's call, and in doing so had a right to avail themselves of the benefit it holds out, to name what property they best could spare. The Sheriff could not seize any thing else the property pointed out being sufficient.

ADMITTING that the Sheriff erred in the construction of the law, what damages is he bound to pay? The answer is, the damages which may legally be recovered from him who withholds

the money of another: the damages which the Sheriff would be bound to pay, had he made the money and applied it to his own use. "However "great," says Pothier, "may be the damages, which "the creditor sustains from the delay of payment "of the sum due, whether it proceeds from the "*negligence, fraud or obstinacy* of the debtor, he "can have *no other* compensation than the interest." 1 *Traité des Obligations*, 104 *no.* 150. This the Sheriff has secured to him.

It is contended by the plaintiff's counsel that as the law "enables him to select that species of "writ, which he conceives best calculated to force "the defendant to do him justice, it is fair to "presume that, in the same spirit, it also allows "him, where the necessity exists to accomplish "his purpose, the choice of property." Let this reasoning be admitted to be perfectly correct and the consequence will be that, in Great Britain and such of these states, where the plaintiff may choose his writ, take out a *ca' sa'* or *fi. fa.* at his pleasure, the choice of precept carries with it the choice of property to be taken. Having conceded this, the learned counsel will not dispute that where there is no choice of writ, there ought to be no choice of property. Now, in Louisiana this choice does not exist: the plaintiff must in every case take out a *fi. fa.* and when the Sheriff returns *nulla bona*, then, and not till then, can the *ca' sa'* legally issue.

West. District. October, 1814.

MORGAN'S AD'R. vs. WOODRUFF.

LASTLY, the plaintiff ought not to recover because he has neglected to arrest, as he might if he had pleased, all proceedings on the execution before the sale. *Curia Philipica* 93, *title Execution, no.* 4.

*By the Court.* In this case, the plaintiff and appellant having obtained a judgment against several persons, as stated in his petition, caused execution to issue in the usual form prescribed by law. The writ was put into the hands of the defendant and appellee, who is Sheriff of the Parish of St. Landry and who, in addition to what is required of him in the process, was particularly instructed by the counsel of the plaintiff, to levy on the personal estates of the defendants and particularly not to take under the execution waste and uncultivated lands.

IT is admitted by the statement of facts that the defendant had sufficient personal property to satisfy the execution at the time it came into the hands of the Sheriff, but that contrary to what was required of him, by the express words of the writ, and in violation of the instruction of the plaintiff's counsel, he did seize waste land, with the exception of three town lots, sold at a year's credit.

THE present action is brought against the Sheriff to recover the whole amount of the judgment obtained by the appellant against the defendants in the original suit, on which the execution issued and was acted on as above stated.

In the investigation of this cause, three principal questions occur.

1. When a defendant in execution possesses a sufficient quantity of personal property to satisfy the judgment against him, is the Sheriff bound indispensably to seize such property, or may the defendant wave his privilege, if it may be so called, of having his personal estate sold and offer real property to be executed?

2. In default of personal property, is it left to the choice of the defendant to point out what part of his real estate shall be seized, or can the plaintiff direct the manner of proceeding on the execution?

3. If the Sheriff, as in the present case, neglects to pursue his duty by levying on the personal estate, as commanded by the writ, but seizes real property and proceeds on such seizure as required by law, to the final disposition of it on said writ without opposition, can he be made answerable in an action for the whole amount of the execution?

I. As to the first point, there can be no doubt of the Sheriff being bound to seize the personal estate of the debtor. This is expressly required by law and is positively commanded by the writ. In opposition to this it is contended, that the reason of the law is founded on a respect to the situation of debtors and that its intention is to prevent an oppressive use of executions on defen-

West. District. October, 1814.

Morgan's An'n. vs. Woolsey.

dants, or in other words that it is a rule made for their benefit and that on general principles of law, every one may wave privileges and dispense with regulations, intended solely for his advantage. This perhaps is true, but the exercise of such rights can only be tolerated by courts of justice, when in their operation, they do no injury to other persons; and, under the existing circumstances of our laws, it is clear that the plaintiff may be injured by a delay in the recovery of his debt, if the Sheriff should be bound to execute real estate, instead of personal, at the request of the defendant. The former species of property particularly land may and generally is sold on a year's credit in addition to the great delay necessarily created by law, in requiring real property to be advertised for a much longer time than personal.

The rules of the Spanish law are conformable to the provisions of the act of the legislative council in requiring personal property to be first seized in execution, and real estate only to be executed in default of these, and in those laws we find it expressly stated, that altho' the defendant has the privilege of shewing the property, he cannot, having personal estate, point out real, for execution. *Curia Philipica* 11 *P. Juicio executivo, title Execution, no.* 3.

II. The second question arising in this case seems to be settled by the same authority. In *no.* 1,

the author treating of the same subject, lays it down as a rule of law, generally understood that the debtor has to name the goods to be executed, and that, if he will not point out his property for execution it was considered by some authors that he should be arrested and compelled to do it, but the practice appears to be that the debtor should be required to name the property, and on his refusal so to do, or should he name an insufficient quantity, the creditor may point it out or the Sheriff seize at discretion. This manner of proceeding has nothing unreasonable in it and can do no injury to the creditor or plaintiff in execution, where the property is sold for ready money: for certainly to him, it is a matter of no consequence on the sale of what property he obtains payment of his debt, provided if is effected in a reasonable time. But it is said, and with truth, that under the existing laws of the state, and in the present situation of the country, the inhabitants holding vast quantities of waste and uncultivated land, which will not sell for ready money, to permit the defendant in execution to point out the property to be levied on amounts almost to a prohibition on the part of the plaintiff of ever being able to recover his debt: as this species of property will always be named by the debtor and by the sale of it the Sheriff will never be able to raise money. This certainly is a great evil, which has its origin in the act of our legislature requiring the sale of real

West District. October 1814

Morgan's Ad'r. vs. Woodhies.

estate at a year's credit, in cases where it will not produce two thirds of its appraised value. It is however an evil, which in our opinion can only be remedied by legislative interference. There is nothing found in the laws, made by our legislature, which does repeal or destroy the operation of the former laws of the country on this subject. Unless we consider as such the inconveniences arising from the new and additional regulations, which would be to carry the doctrine of abrogation to length never heretofore heard of, and in violation of all legal constructions. On this head, it is therefore the opinion of this Court that the manner of proceeding on executions where it is not otherwise provided for by laws since enacted, must be according to the provisions of the former laws of the country, by which it seems that the defendant has the right or is bound to name the property to be executed, whether personal or real.

III. The Sheriff is not answerable in the present suit for the whole amount of the judgment obtained against the defendant in the original action.

It is a maxim of law that there can exist no wrong without a remedy: yet redress in damages ought in all cases to be proportioned to the injury sustained, unless in cases where they are given as an example to deter from similar conduct in future, which is really punishing men for their bad intentions.

The Sheriff, in the case before the Court, has failed in the proper discharge of his duty by levying on real estate, while the defendant possessed sufficient personal property to satisfy the execution: and altho' there are circumstances which have a tendency to shew that his conduct has not proceeded from the best motives on his part, yet he may have conceived that the defendants in execution had a right to wave the laws requiring the seizure of personal estate, if to be had, and offer in its place real property; and can now only be made answerable in damages, to the plaintiff in execution for the injury which he has actually suffered. Nothing has been shewn to the Court by which the amount of damages may be fairly ascertained. It cannot be the sum recovered by the appellant against the defendant in his former suit; because he has had the full benefit of his execution by a levy on lands, which he has suffered to proceed, without any kind of opposition, to a sale and transfer as required by law. This we say he has permitted; because according to the Spanish laws on the subject he might have caused the execution, when he discovered the Sheriff proceeded irregularly and contrary to law, to be annulled and quashed on application to the District Court, and on a new execution the Sheriff would have been compelled to proceed legally. *Curia Philipica*, 93, *title Execution, no.* 4. And altho' by this law it does appear that the execution is null and

West. District. October 1814.

Morgan's Ad'm. vs. Woodruff.

void, as having been executed contrary to its intent and form, yet as the Sheriff has been suffered to proceed on it, until third persons may have become interested by sales under it, the party would now be too late, to proceed in any way to have it annulled. Under the circumstances of this case the only injury which the appellant suffers by the conduct of the Sheriff is a greater delay in recovering the money on his execution and perhaps judgment might regularly be given in his favour for the interest of the money during the period of delay; but this would be allowing him to recover twice on the same cause of action, as this interest will be obtained, or ought to be, at the expiration of the year, the term of credit on which the property has been sold. Thus were we to given judgment for the whole amount of the judgment on which the execution issued, it would be according to the appellant a double remedy by enabling him to recover by means of the mortgage and security procured on the execution and also the same amount in damages against the Sheriff; this certainly cannot be just or legal. The appellant having neglected to arrest the illegal proceeding of the Sheriff on the execution and have it annulled and not having shewn any particular damage, occasioned by his conduct,

It is ordered and adjudged that the judgment of the District Court be affirmed with costs.

## CLOUTIER vs. LECOMTE.

*Res judicata* is when the same *thing* is demanded by the same *parties*, in the same *capacity* and for the same *cause*.

*By the Court.* In the year 1810, Joseph Dupré, the step son of the plaintiff, now the appellee, died possessed of an estate, part of which he bequeathed to his brother of the half blood John B. Sévère Cloutier, son of the appellee, part to a mulatto woman named Adelaide, and the remainder to his natural children.

JOHN B. SEVERE CLOUTIER, by his father and curator *ad litem*, the present appellee, claimed against the will of his brother, and obtained in the Parish Court of Nachitoches a decree declaring null all the legacies, except that made to himself, and recognising him as the heir at law of his deceased brother. In the article concerning the legacy made to himself it was expressed that if he should die without issue, it would revert to the testator's nearest relation on his mother's side. The executor of that will was Ambroise Lecomte the present appellant.

JOHN B. SEVERE CLOUTIER having since died without posterity, his father, the present appellee, inherited all his estate, and brought this suit against the appellant, as executor of Joseph Dupré, demanding from him all the property which his son had inherited from said Dupré his brother, and which he alledged the appellant unduly detained from him. To this demand the defendant answers that he is ready to account to

West. District. October 1814.

CLOUTIER vs. LECOMTE.

the plaintiff for all sums of money or other property which is legally entitled to receive out of the succession of Joseph Dupré; but that he, the appellant, and Marie Lecomte Porter have a right, as the nearest of kin of the deceased Dupré, by his mother's side, to retain that portion of Dupré's estate, which, in case of the death of the son of the plaintiff without issue, was to revert to them.

THE matter in issue between the parties is therefore only this: is the defendant entitled to that portion of Dupré's estate?

THE plaintiff contends that this clause of Dupré's will is a substitution, and therefore void, according to the provisions of our Civil Code by which substitutions generally are abolished.

THE defendant alledges, 1. that this is a matter already settled in the Parish Court of Nachitoches, in the suit of John B. Sévère Cloutier, son of the appellee, against the present plaintiff, executor of the will of Joseph Dupré, where, it was adjudged by that court that the testament of Joseph Dupré was valid *in every respect*, except as to the legacies made to Adelaide and her children;

2. THAT the clause of that testament, which provides that, in case of J. B. S. Cloutier's death without issue, the property bequeathed him shall revert to his nearest of kin on his mother's side, is not a substitution, and therefore not void in law.

I. To this case, very simple in its origin, very clear in its facts, the judgment rendered by the Parish Court of Nachitoches in the first suit has given a most singular aspect. It seems to present the extraordinary spectacle of an heir at law and a legatee united in the same person, being as heir entitled to the whole estate of his predecessor, and as legatee to a portion of that same whole. That judgment, it is said, has settled the present contestation, because it recognises the validity of Dupré's will *in every respect*, except the legacies made to Adelaide and her children, and therefore sanctions the clause by which Dupré provided that the legacy by him left to his brother should, in case of his death without issue, revert to his nearest maternal relation.

WITHOUT examining what is the real substance of that judgment, and in what light the general tenor of it ought to be viewed, let us see if it can be considered as *res judicata* in the present case.

"THE authority of the thing judged," says our *Civil Code* 314, *art.* 252, "takes place only "with regard to what has formed the object of "the judgment. The thing demanded must be "the same; the demand must be founded on "the same cause, between the same parties, and "formed by them or against them in the same "quality."

IF we attempt to apply this rule to the present case, what do we see? Is the thing demanded

West. District. October 1814.

CLOUTIER vs. LECOMTE.

the same? The general demand in both suits is the possession of the estate of Joseph Dupré: in that indeed they seem to be alike; but in the first, the legacies made to Adelaide and to the natural children of the testator were the thing demanded, for John B. S. Cloutier, could not demand that which no body denied to him, to wit, the legacy made to himself: while in the second, the sum of money first bequeathed to J. B. S. Cloutier, and in reversion to the defendant, is the object of contestation. Again, is the demand between the same parties and formed by them or against them in the same quality? The parties to the first suit were John B. S. Cloutier heir of Joseph Dupré, and Ambroise Lecomte, executor of Dupré's will, acting as such in defence of the rights of Adelaide and of the natural children of the testator. In this case, although the general principle be that heirs are to be considered as the same parties with their predecessors, it is not very clear that Alexis Cloutier, claiming a right which did not accrue until after the death of his son, is a party acting in the same quality; but laying that aside, the defendant Lecomte surely is not a party to the present suit in the same capacity in which he was a party to the first; for here he appears both as executor and as legatee under the will of Dupré, pretending to keep possession of the legacy made reversible to him. Finally, what formed the object of the judgment of the

Parish Court of Nachitoches? Was it any thing else than the legacies to Adelaide and to the natural children of the testator? Was there and could there be any thing else at issue between those parties? The legacy made to John B. S. Cloutier could not be a subject of contest between him and the executor of the will: he was to receive that part at all events as his absolute property. He had no interest, and, therefore, no right to put in issue the effect which the clause inserted in that article of the will was to have after his death; and the record, particularly the answer of the present appellant and the judgment of the Parish Court shew that none of the parties ever had the most remote idea of agitating that question. The object of that judgment, therefore, was not the matter now in dispute between the present parties; and that judgment, far from having here the authority of the thing judged, must be considered as having left untouched the very subject of the present contention.

II. As to the second question raised in this case, to wit, whether the clause of Dupré's will providing that if his brother dies without issue the legacy left to him shall go to the testator's nearest relation on the side of his mother, be a substitution, it is unnecessary to say any thing. That it is a substitution appears upon the face of it; reasoning upon this would be worse than nugatory.

West. District. October 1814.

CLOUTIER vs. LECOMTE.

IT is the opinion of this Court that Alexis Cloutier is entitled to the whole estate left by Joseph Dupré; and it is accordingly adjudged and decreed that the judgment of the District Court be affirmed: and in addition to it, it is farther adjudged and decreed that the appellant do give to the appellee a true and faithful account of his administration of the said estate, and deliver him all sums of money or other property belonging to the same.

*GRAFTON* vs. *FLETCHER.*

Parol evidence of a sale of land cannot be received tho' the vendee be in possession.

*By the Court.* Daniel Grafton, the appellee, brought this suit, in the Court of the seventh District, for a sum by him claimed as the price of a tract of land, which he averred to have sold to the defendant the present appellant. No written act of the alledged sale was exhibited, but the plaintiff offered testimonial proof of that contract and of the possession which the appellant had under it. To the introduction of such evidence the appellant objected, and his objection being overruled he excepted to the opinion of the judge. Upon this bill of exceptions the case is brought before this Court.

IT is alledged by the appellee

1. THAT the bill of exceptions was not tendered in due time, and is therefore entitled to no attention:

2. THAT supposing the bill of exceptions to be regularly entered, yet the admission of oral evidence in this instance was right, because the contract was in part performed; and that such a contract, after it has been partly carried into effect, is no longer within the purview of the law which declares null the verbal sale of an immoveable.

THE fact from which we are to deduce that the bill of exceptions was not tendered in open court at the trial, is that the instrument purporting to be a bill of exceptions contains matter which at that time could not be known, to wit, that an appeal had been claimed, and that a transcript of the depositions was, together with the bill of exceptions, sent to the Supreme Court. But, although this instrument evidently must have been written since the trial, it does by no means follow that a bill of exceptions was not tendered then.

THE judge may have put it afterwards in the form which it now bears; at least we are bound to presume so from the expressions which he uses, to wit, that "the counsel did then and there "(speaking of the trial) except to the opinion of "the court, and requested the court to sign and "seal this his bill of exceptions." This positive declaration of the judge is not to be counterbalanced by mere hints and presumptions: nothing but contrary proof could shake it.

West. District. October 1814.

GRAFTON vs. FLETCHER.

BUT the appellee contends that admitting the bill of exceptions to have been tendered in time, yet it will not avail the appellant, because the oral evidence objected to was rightfully received in this case.

THE general rule is that no verbal sale of immoveables or slaves shall be valid, and that no testimonial proof of such sales shall be heard. But, says the appellee, where there has been part performance of the contract, this law ought not to apply; it was not intended for such cases. Weak indeed would be the power of the laws, if their commands could be disobeyed under such pretences. If the sale of an immoveable cannot be proved by witnesses, neither can the performance; until the existence of the contract is ascertained. In this case, proving mere possession would have amounted to nothing; proving possession *under the sale* was the object. But if there was no proof of the sale, how could the witnesses prove possession *under it?*

WE, therefore, think that the District Judge erred in admitting such evidence, and we do accordingly adjudge and decree that the judgment of the District Court be reversed, and that the cause be remanded for a new trial to the said court, with instructions to the Judge not to admit oral evidence of the contract of sale which is the subject of this suit.

West District. October 1814.

PAILLETTE & AL. vs. CARR.

The majority of the administrators of a public school may sue, in their own names.

Altho' the defendant added the words "Parish Judge" to his name, in signing a note he is personally suable.

*Baldwin*, for the plaintiffs. This cause has been brought up upon a bill of exceptions which states

1. THAT the plaintiffs and appellees cannot maintain an action against the appellant, they being only a majority of the board of administrators of the public school, while a suit could only be brought by all of them jointly.

2. THAT the obligation on which the defendant is sued, being signed by him as Parish Judge, he is not liable as an individual.

I. THE prominent and material features of this case appear from the record to be these. The administrators of the public school, being authorised to draw from the treasury the sum of two thousand dollars, gave a draft to the appellant for that sum, to facilitate him in the payment of a sum which he owed to the treasury, for the arrearages of taxes that he had failed to transmit. Upon the receipt of this draft, he gave his note payable to the administrators of the public school, and signed it as Parish Judge. Suit was brought by the appellees in their names, stating themselves to be administrators. During the progress of the trial the exceptions were taken, but not being considered good by the District Court, judgment was rendered for the sum, after deducting some payment which had been made.

West. District
October 1814

PALLETTE & AL. vs. CARR.

I SHALL confine myself to the points brought into view by the exceptions. As to the first then, is it well taken? I contend that it is not. To understand the question, or the correctness of the decision, it is necessary to call into review the different statutes authorising and establishing public seminaries. The first was passed in the 1st, session of the Legislative Council, *chap.* 30. This establishes the University, gives it the name of the "University of Orleans" incorporates it by that name and appoints the regents. The *chap.* 8 of the acts of the 2d session of the Legislative Council is a supplement to the above act, empowering the regents to fill vacancies. The 18th *chap.* of the acts of the 2d sess. of the 3d Legislature enlarges the power of the regents and directs them to appoint three administrators to each of the schools established in each county in the then territory. By the said act, it is made the duty of said administrators to superintend the schools under their direction and controul, to draw for the sum appropriated to purchase lots and buildings, &c. and authorises them to make such by-laws and ordinances as they may think fit for the government and discipline of their respective schools. This act enlarges and extends the first act of incorporation to the schools in the different counties and constitutes them an integral part of the first body corporate, vested with all the privileges, capacities and powers over the subjects committed to their

administration, in as full and perfect a manner as was given to the original institution, and consequently they can proceed in the discharge of their functions, in the same manner as the first body corporate can do.

WHAT then are powers of a body corporate with respect to the commencing and conducting suits at law? As it cannot appear in the persons of its members, it must appear by attorney, who can be appointed, by the laws of England and by the Civil Law, by a majority of its members, 1 *Black. Com.* 478, *Domat*, *book* 2, *tit.* 3, § 1. The appellees then, being a majority, had a right to appoint an attorney to institute and conduct the suit. The appellant cannot protect himself under the plea that he is one of the members. If he could, one member might controul the corporation and frustrate the object for which it was created, by obtaining and withholding the funds by means of which alone it is enabled to act, or by fraud or violence impede and stop its proceedings. For which conduct, by this privilege of exemption from suits contended for, he could protect himself with impunity from judicial punishment and from judicial process. Which ever members first seized the funds might hold them until his conscience prompted him to a surrender. But such conduct would be as contrary to law as to common reason and common honesty. A majority has a right to appoint an attorney and to direct

West. District. October 1814.

PAILLETTE & AL. vs. CARR.

suit to be brought even against one of its members.

Is this suit then well brought in the name of the appellees? They are stiled administrators of the school &c. It is the practice in the different states and in England to sue by the name of the corporation and the enumeration of the individual members would at best be inconvenient surplusage. But the 26th chap. of the acts of the 1st session of the Legislative Council requires that petitions should state the names of the parties, their *places of residence*, &c. It is true that the appellees might have been well designated by calling them the administrators of the school. But then an important circumstance would have been omitted, to wit, their residence. Now a corporation can have no residence because it is an artificial, invisible, intangible body and if the names of the appellees had not been stated with the place of their residence, they would under this requisite of the statute have failed in their suit, as an objection would well have laid to the sufficiency of the petition.

II. THE second objection will not require much discussion. The appellation of Parish Judge did not enter into the essence of the contract. It was an addition made to his name, not because he contracted in his official capacity and by virtue of his office, for it was a private individual transac-

tion; but it may be presumed from a little vanity to have it spread upon the record that he bore that title.

THE judgment being correctly rendered for the sum due, another question presents itself for the consideration of this Court. The statute authorises this Court to assess damages to the appellees when an appeal is taken for the purpose of delay. No case has yet come under the cognizance of the Court that gives the appellees juster pretentions to expect a compensation for the delay occasioned by the appeal, beyond the legal interest. The whole of the appellant's conduct justifies a belief that he obtained the money from the appellees with a view, if not of appropriating it exclusively to himself, at least of retaining it until it should be forced from him by the last judicial process, and, when received, it ought in justice to be accompanied with ten per cent damages.

*Wallis*, for the defendant. The exceptions in this case are well taken. The administrators are to act jointly in every thing which concerns their administration: no one of them can act by himself. It is the body corporate that acts; not the individuals. The body corporate is considered in law as one being, as one existence inseparable in its nature and incapable of division.

West. District. October 1814.

PAILLETTE & AL. vs. CARR.

It must act entire or not at all. As well might an individual act against himself, as a corporation against any of its members. The limbs are not more closely attached to the natural body than the individual members are united to the body corporate. They enter into and form its essence. How then can they be separated?

THE authority cited do not militate against the principle contended for. They say that the act of the majority is the act of the whole. This is not disputed. But is it to be considered when acting against each other? If such was the case the authority who legislated upon the subject would have thrown out some hint from which it could have clearly been understood that such was the truth. Nothing however in their expressions will justify such a conclusion. Hence it is inferred that such is not the law. If it was, the most inconvenient consequences would result from its operation. If the minority became offensive to the majority, the latter would unite in a suit against them and with the assistance of the corporate funds carry on their legal prosecution without any expence to the individuals composing that majority. Or, if this did not answer their purpose they could proceed a little further and pass an act of expulsion. The majority of the members of this school may act, but it must be understood to be, in cases coming within their administration, not to sue or expel an offending

member. If either of them violates his duty so far as to lay himself liable to a suit, he ought to be expelled by a competent authority before the suit can be commenced.

The other exception is equally strong in favor of the appellant. The nature of the obligation is to be observed in bringing suit. No man is bound beyond or differently from his contract. If the obligation is contracted as tutor or curator, the obligor is only bound in that capacity. If as an attorney in fact, he can only be personally liable by deviating from his authority, or failing to fulfil his undertaking. Here the appellant contracted as Parish Judge. It was accepted with that qualification and it can only be enforced with that addition.

If the Court should be of opinion that the judgment below is correct, damages however ought not to be decreed, as the appellant had certainly good reason to believe that it is erroneous and the appeal was not taken for delay, but to correct the error.

*By the Court.* In all bodies corporate the majority must rule, and there is no doubt that two of the three administrators of this school had a right to sue in the name of the board. The only difficulty, if such it can be called, is that instead of bringing their action in the corporate name of the board of administrators, they have added their

West. District. October 1814.

BAILLETTE & AL. vs. CARR.

own individual names. But, this defect in the appellation of the suitors is a mere surplusage, and as such must be disregarded.

THE other objection of the defendant is still more unimportant. He thought fit to sign the note now in suit as Parish Judge; but whether he was Parish Judge or not, at the time he received the money, is a matter of no consequence. This was money lent him to answer his purposes; money which he applied to the discharge of his obligations, and which he promised to return. What has his official capacity to do with such a transaction?

VARIOUS other difficulties, not worthy of notice, have been raised by the appellant, which, together with those above adverted to, have led this Court to suspect that the object of the appellant, ever since the beginning of this suit, has been delay.

IN a case of this nature, where the deposit of public funds, destined for the most useful of purposes, has been unwarrantably detained; where the obligation to return them *at sight* has been eluded during such a length of time, it is just that we should allow to the plaintiffs not only the interest of the money, since the judicial demand, but also the full amount of the damages which the law permits to give.

IT is, therefore, adjudged and decreed that the judgment of the District Court be confirmed, and that in addition to the twelve hundred and fifty dollars therein awarded to the appellees, they do recover five per cent. interest from the day of the judicial demand, and ten per cent. damages, with costs.

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*MARTINEAU & AL.* vs. *CARR & AL.*

The answer of a partner to interrogatories suffices, if not excepted to.

*Murray*, for the plaintiffs. This case is a simple one and requires but little argument on the part of the appellees, who were the plaintiffs below. From an examination of the record no error can be discovered and it is believed none exists. The seventh section of the 26th *chap.* of the acts of the Legislative Council is conclusive in this respect.

*Baldwin*, for the defendants. The only question for decision in this case is, whether the District Court did right in considering the separate answer of one of two partners as sufficient, to an interrogatory put to them both.

IT must be decided by the construction put upon the expressions contained in the act of the first session of the Legislative Council, *chap.* 26, § 7. It is there required that the defendant should distinctly answer &c. It does not speak in the plural. How are partners then to be considered

West District. October 1814.

MARTINEAU & AL. vs. CARR & AL.

in their partnership transactions, or when they appear in Court as plaintiffs or defendants? Are they to be considered as one or several individuals? Are they to appear in the name of the firm, or in their real names? It is true that one partner can bind all the others by his contract, but in a partnership debt or contract all the partners must sue or be sued: otherwise the suit cannot be maintained. 1 *Comyns on Cont.* 326. A partnership differs in this respect, from a body corporate. The latter is composed of natural persons, but in their corporate capacity their individuality is lost. It appears in contracts and in Courts by its corporate name, and is recognized by its attorney and by its seal. The former has no such attributes; the members retain their individual character and are known by their real names, they must all appear as plaintiffs or defendants in petitions and answers. Interrogatories put by them must be in the name of all and when referred to them must be answered by all. It may often happen that any question proposed to the members of a firm will be answered differently by the different persons, according to their knowledge of the facts. One may be acquainted with circumstances and disclose what was desired to be known, of which the others may be totally ignorant. A person sued by a firm has a right to a full discovery of all the knowledge of all the members. Otherwise it would be in vain to interrogate, as the one

would answer whose information upon the subject was the most limited. As all the members then are obliged to answer to a petition filed against them all, *a fortiori* they are obliged to answer to a question put to them all.

It is, however, said that the 10th section of the same act provides for the excepting to insufficient answers and that the answer of one partner is good unless excepted to. To this it may be replied, that it must be an answer within the spirit and meaning of the provision before an exception can be required. For example, the answer must be upon a oath, in due form, taken before some officer authorised to administer oaths or it is no answer; it must be an answer to some fact or matter contained in the interrogatory, or it is no answer; and it must be the answer of him who is interrogated on it or is no answer, and consequently need not and indeed cannot be excepted to. It is impossible to except to an answer that does not exist. As all the partners therefore are bound to appear and answer, if but one alone appears he cannot be received and the party interrogating will not be driven to exceptions. His proper remedy is to take the facts for confessed and pray for judgment. Here is nothing to except to, for there is no answer. It is not "*insufficient*," for it does not exist. The questions were put to Martineau and Landreau and they are answered by the former only.

West. District. October 1814.

MARTINEAU & AL. vs. EARL & AL.

THIS part of the statute is deemed to apply only where the answer is made with the requisite solemnity by the person or persons interrogated and having some application to the questions proposed, but is *evasive* or not *distinct*; and shewing, or giving reason to believe or exciting a suspicion that the whole truth is not disclosed.

WHENCE it is contended that the District Court erred in receiving the answer of one of the parties, and this Court ought to remand the cause with instructions to reject the answer, to take the interrogatory for confessed and give judgment accordingly.

BUT admitting that the answer is in the form required by the statute, yet it is only good as to the person whose answer it is. It cannot be good for another. It cannot protect Landreau. An attorney may appear for all the defendants named in the petition: though when interrogated they must answer in their proper persons. An attorney cannot swear for them, nor can they swear for each other. Each witness testifies according to his own knowledge, not from the knowledge of others. If two or more persons join in an obligation and are sued and interrogated, they must all answer and the answer of one will not avail the others. If there are several endorsers of a bill of exchange who are sued and interrogated; the answer of one will not serve the others. If two or more sign a negotiable note and are sued and

interrogated; the answer of one will not aid the others. In all these cases then as they are all required and bound to answer, those who do not are in default and the interrogatories will be taken for confessed and judgment entered against them who thus refuse. These cases are similar to the one before the Court. This is a mercantile transaction; and so are those as far as they extend, and as judgment must and would be given in the foregoing cases against those who neglected or refused to answer, so the Court here ought to have given judgment against Landreau and the judgment ought to be reversed as to him.

*Murray*, in reply. It is true that partners must set out their names in petitions, but it is not true that all their names are required in answering. It is the usual practice to give the title of the suit at the head of the answer, and nothing more is required. It is however contended that when an interrogatory is put to two or more partners they are all bound to answer and that the answer of one alone ought not to be received. This is considered to be incorrect, one partner contracts for all the others in all transactions which concern the partnership and they are all bound. Each one is presumed to be acquainted with all the circumstances relating to their joint concerns: and it is natural and reasonable to suppose that where an interrogatory is referred to them, the full

West. District. October 1814.

MARTINEAU & AL. vs. CARR & AL.

and explicit answer of one contains the information of the whole, as it is presumable *that* one would answer who was best informed upon the subject. It is not important to enquire into the difference between a partnership and a body corporate as the cause does not turn upon the distinction. It must be decided upon the construction given to the statute first cited. A construction is attempted to be given to the statute which cannot be admitted. An effort has been made to shew a difference between an insufficient answer and a case like the present, where but one partner answers, which it is urged is to be considered as no answer. But it certainly is an answer and is to be taken as such until the contrary is shewn. It purports to be one and *primâ facie* is so, and if no objection is made to it, it must and will be received as such by the Court. There is a wide difference between this and no answer. In the latter case the Court would take notice of the want of one and would take the fact as admitted, though here they will consider it good until the defect is shewn.

How then must it be made to appear? The law is explicit. It must be by an exception and as the party did not resort to this plain and easy mode, he has waved the benefit of it, if any benefit could have been attained.

It is next endeavoured to be shewn that judgment ought to have been given against Landreau as he did not answer, and to support the argument

recourse is had to the rules of evidence. But if the answer is presumed to be sufficient until the contrary is shewn, this attempt must fail, for the receiving of it does away the effect of that argument. It cannot be correct reasoning to say, that which is *primâ facie* good does not exist. The judgment is correctly entered by the Court below and ought to be affirmed.

*By the Court.* It appears from the documents transmitted that the appellees brought their action on a note regularly transferred to them as merchants trading under the firm of Martineau and Landreau, by J. J. Paillette, in whose favor it was made by the appellants. In an amended answer, Nancarrow, one of them, filed the interrogatories, the admission of the answers to which as evidence is made the basis of the exception to the opinion of the District Court. These interrogatories are put to Martineau and Landreau, the appellation by which they are known, as a commercial firm or society. Martineau, one of the partners, makes to them a full and complete answer expressing a perfect knowledge of the transaction. In suits where partners are concerned, the opposite party might perhaps require the separate answers of each individual composing the society. In such a case the answers of every member would be necessary; but when a firm is interrogated, as in the present case, we are inclined to think

West. District. October 1814.

MARTINEAU & AL. vs. CASE & AL.

that an explicit and categorical answer of one partner is sufficient. No exceptions were made to the insufficiency of the answers in writing as required by law, previous to the trial of the cause. It is, therefore, ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

*** THERE was not any case determined during the month of November.